In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 544

ASHTON J. MOUTON, Collector of Revenue for the State of Louisiana (Successor in office to Roland Cocreham) and THE STATE OF LOUISIANA, PETITIONERS

v.

UNITED STATES OF AMERICA and CHRYSLER CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

This is an action by the United States and Chrysler Corporation to recover approximately $925,000 in state use taxes and interest that Chrysler paid under protest. Pursuant to a contract with the United States, Chrysler undertook to acquire for the government the machinery and equipment necessary to adapt the Michoud Ordnance Plant in New Orleans

to produce military tank engines. Petitioners assessed use taxes upon Chrysler's use of the property, which it acquired for the United States in carrying out this contract. Chrysler entered into an agreement with petitioners for payment of the tax by delivering cash and bonds to be held in safekeeping pending a final judicial determination. Pursuant to their contract, the United States reimbursed Chrysler for the amount paid under protest and is entitled to any part of the fund recovered. (Pet. 17-18, 24-26; R. 32-37, 43, 128-136.) [1]

Chrysler instituted a suit for refund in a Louisiana state court, and the United States subsequently intervened.[2] The state court determined in that litigation (1) that the statute [3] taxes only the use of tangible personal property by its *owner*, not the use of the property by someone else, and (2) that the United States, not Chrysler, was the owner of the property in question (R. 114-117). Based on this conclusion, the court followed the decisions of the Supreme Court of Louisiana in the companion litigation involving City of New Orleans taxes [4] and held (1) that Chrysler did

---

[1] "R." references are to the printed record filed in the court of appeals.

[2] Contrary to petitioners' statement (Pet. 5), the record indicates that petitioners have been aware of Chrysler's right to reimbursement and the government's interest since before the time the escrow agreement was arranged (R. 126).

[3] 25 West's Louisiana Statutes Annotated, Revised Statutes, Secs. 47:301(18), 47:302.

[4] *Chrysler Corp.* v. *City of New Orleans*, 238 La. 123, 114 So. 2d 579; *Chrysler Corp.* v. *City of New Orleans*, 243 La.

not have the requisite standing under Louisiana procedure to maintain the suit for a refund since it was not the owner of the property and had been reimbursed by the United States (R. 114-115), and (2) that this conclusion required dismissal of the United States intervention, since under Louisiana law an intervenor cannot maintain the action after the main demand of the plaintiff has been dismissed (R. 115).

As in the litigation over the New Orleans taxes, see *City of New Orleans* v. *United States*, 371 F. 2d 21 (C. A. 5), certiorari denied, 387 U.S. 944, petition for rehearing pending, No. 1303, Oct. 1966 Term, the United States then instituted the instant case as an independent action to recover the fund based on unjust enrichment, money had and received, and the escrow agreement, contending that since petitioners may not tax the United States on property owned by the United States[5] and the statute did not purport to tax Chrysler, a non-owner, it followed that the tax was invalidly collected (R. 2-8). Chrysler has been joined as a party plaintiff only to insure that the United States is granted complete relief. The district court granted summary judgment for petitioners and denied summary judgment for the United States (Pet. 46-47). Acknowledging that the taxes were collected illegally (Pet. 44), the district court reiterated that

---

498, 145 So. 2d 11. Counsel for petitioners participated in both appeals as *amicus curiae*.

[5] *McCulloch* v. *Maryland*, 4 Wheat. 316, 436; *United States* v. *Allegheny County*, 322 U.S. 174, 176-177.

state law[6] did not provide Chrysler with standing to sue for recovery of the taxes and held that the United States also lacked standing because it was not the person who had paid the taxes, as the statute requires (Pet. 18-19, 31-44). That court also ruled that Chrysler was barred by the prior action in the State court and because Louisiana had not consented to Chrysler's suit in the federal court.[7]

Noting that the reasoning of the district court had been expressly rejected in the companion case of *City of New Orleans* v. *United States*, *supra*, the court below concluded that the district court had "ample power * * * to protect the sovereign against such unjust enrichment on familiar principles of money had and received" (371 F. 2d at 28), and reversed (Pet. 17-20, rehearing denied, Pet. 22).

The decision below is correct, and there is no conflict or other basis for further review.

1. Petitioners first argue that the United States is barred by principles of res judicata from maintaining this action. From cases such as *Lovejoy* v. *Murray*, 3 Wall. 1, and *Bros, Inc.* v. *W. E. Grace Mfg. Co.*, 261 F. 2d 428 (C. A. 5), petitioners contend that the prior litigation in the State court bars the United States from bringing this action because (Pet. 8-9)

---

[6] 25 West's Louisiana Statutes Annotated, Revised Statutes, Sec. 47:1576. (Pet. 18, fn. 1.)

[7] This latter aspect of the district court's reasoning in the present case was rejected in *Mississippi River Fuel Corp.* v. *Cocreham*, (C.A. 5), decided Sept. 13, 1967, which held that Louisiana has consented to federal court actions for the refund of State taxes.

"The decision in the State Court was adverse to the interest of the United States." The *Lovejoy* decision and other cases following it merely add to the central concepts of res judicata and collateral estoppel the principle that one who is not a party to an action but who actively manages and directs the conduct of the case may under certain circumstances be treated as if "he had been a party." *Souffront* v. *Compagnie des Sucreries*, 217 U.S. 475, 487; see 1B Moore, *Federal Practice* (1965), par. 0.411[6].

But contrary to petitioners' statement (Pet. 11), it does not follow that the United States has already had its day in court on its claim for recovery of the fund. The State court did not pass on the United States claim, nor could it; it concluded that while the United States owned the property, thus rendering the tax invalid, Chrysler lacked the requisite standing to recover the tax. This conclusion also required the dismissal of the United States intervention since, under Louisiana law, an intervention falls with the main demand. (R. 115.) As the Fifth Circuit noted in the *New Orleans* case, after such a dismissal the intervenor is, under Louisiana law, "relegated to asserting his cause of action by an independent action" (371 F. 2d at 28, fn. 16), and this is such an independent action. The State court decision would bar any attempt by Chrysler to relitigate its rights to sue under the State refund statute, but it could not and does not affect the rights of the United States to recover from petitioners on any cause of action it has in its own right nor does it bar suit to settle the rights of all concerned under the escrow agreement, which was not

even before the State court.[8] Moreover, the only issue common to both the State court litigation and this case is the ownership of the property, and under the principle of collateral estoppel the State court's resolution of that issue aids, rather than bars, the government's case. See *City of New Orleans* v. *United States*, *supra*, at 26-28.

2. Petitioners also argue that the United States has no right of action to recover the fund (Pet. 3, 11-14). They contend that no decision authorizes the government to maintain an action under the circumstances of this case. However, under the applicable law and the facts found by the district court, as well as by the State court in the prior litigation, petitioners hold funds that they had no right to collect and that Chrysler lacks standing to recover. If not before, certainly upon the government's reimbursement of Chrysler, Chrysler's interest in the fund passed to the United States which thereupon became entitled to recover it.[9] *United States* v. *Summerlin*, 310 U.S. 414, 416; *Korman* v. *Federal Housing Administrator*, 113

---

[8] Even if we were to assume that the United States cause of action here should be equated with that presented through Chrysler in the State court, the judgment of that court, being based on lack of procedural capacity, precludes the parties from relitigating only the very matters decided by the State court, *i.e.*, Chrysler's standing and the ownership of the property. See *Smith* v. *McNeal*, 109 U.S. 426; 1B Moore, *Federal Practice* (1965), pars. 0.405[5], 0.409[1].

[9] The Supreme Court of Louisiana ruled that Chrysler acted as agent for the United States in procuring the property here in question. *Chrysler Corp.* v. *City of New Orleans*, 238 La. 123, 147, 114 So. 2d 579, 587.

F. 2d 743 (C. A. D. C.); *Wagner* v. *McDonald*, 96 F. 2d 273 (C. A. 8). In fulfilling its contractual obligation to reimburse Chrysler, the United States was no mere volunteer; it cannot be held in equity and good conscience to have conferred an unmerited benefit on petitioners. The State court, in denying recovery to Chrysler, noted that (R. 115) "the United States is the party ultimately entitled to the fund if it is to be recovered." It is clear that in these circumstances the United States may recover money illegally had and received in order to avoid unjust enrichment at its expense. *E.g.*, *Ward* v. *Love County*, 253 U.S. 17, 24; *United States* v. *Wurts*, 303 U.S. 414, 415. It has repeatedly done so in actions to recover state taxes illegally exacted and paid. *E.g.*, *Dept. of Employment* v. *United States*, 385 U.S. 355, 358; *Board of Commissioners* v. *United States*, 308 U.S. 343; *Marquardt Corp.* v. *Weber County, Utah*, 360 F. 2d 168 (C. A. 10); *United States* v. *City of Philadelphia*, 50 F. Supp. 170 (E. D. Pa.).

The substance of petitioners' position is that the United States has no way, in any court, of reclaiming the unlawfully extracted taxes. The present grounds for petitioners' contention are unclear. In the lower courts they relied upon the procedure provided by State statute (Pet. 18, fn. 1) and contended that although Chrysler had paid the tax by depositing the money and bonds in escrow, it lost its standing when it was reimbursed by the United States, and although the United States had reimbursed Chrysler, it had no standing because it was not the party who had paid the tax to petitioners (Pet. 18-19). The court

below was certainly right in holding that the United States need not rely on the State statute. Federal law and not State law fashions the remedies available to the United States. *E.g., Clearfield Trust Co.* v. *United States*, 318 U.S. 363; *United States* v. *Independent School Dist. No. 1*, 209 F.2d 578, 580 (C. A. 10). As the court of appeals correctly stated (Pet. 19), quoting from the *New Orleans* decision, 371 F. 2d at 28, "Against the inequities of such a procedural trap, we think there is ample power in the United States District Court to protect the sovereign against such unjust enrichment on familiar principles of money had and received."

Contrary to petitioners' argument (Pet. 13-14), the escrow agreement requires rather than precludes recovery of the fund. The complaint alleged (R. 3-4) and petitioners in their answer admitted (R. 28) that Chrysler paid the tax under an agreement with petitioners that "upon ultimate resolution of the validity of said assessment", petitioners would retain only the same proportion of such segregated property then held as would "equal the proportion of the assessment determined to be valid" and that the balance of the property "would be returned". The State court, while ruling against Chrysler on procedural grounds, held the assessment invalid since the owner of the property was the United States, not Chrysler. Thus, no "proportion of the assessment [was] determined to be valid" within the meaning of the agreement and the entire fund should be "returned".

The petition for writ of certiorari should be denied.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

HAROLD C. WILKENFELD,
J. EDWARD SHILLINGBURG,
Attorneys,
Department of Justice.

EUGENE D. SAUNDERS,
DAVID J. CONROY,
GUY C. LYMAN, JR.,
Attorneys for Chrysler Corporation.

SEPTEMBER, 1967.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 277190 256